Quality Health Services of P.R., Inc. d/b/a Hospital San Cristobal *and* Unidad Laboral De Enfermeras(os) y Empleados De La Salude. Cases 24–CA–011782 and 24–CA–011884

July 25, 2012

DECISION AND ORDER

BY MEMBERS HAYES, GRIFFIN, AND BLOCK

On February 2, 2012, Administrative Law Judge Geoffrey Carter issued the attached decision. The Respondent filed exceptions and a supporting brief and the Acting General Counsel filed an answering brief.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exception and brief and has decided to affirm the judge's rulings, findings,[1] and conclusions and to adopt the recommended Order as modified and set forth in full below.[2]

ORDER

The National Labor Relations Board orders that the Respondent, Quality Health Services of P.R., d/b/a Hospital San Cristobal, Ponce, Puerto Rico, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Failing and refusing to bargain with Unidad Laboral De Enfermeras(os) y Empleados De La Salude (the Union) as the exclusive collective-bargaining representative of the employees in the following bargaining unit:

> Unit B—24–RC–7308: All Licensed Practical Nurses and Respiratory Therapy Technicians, Operating Room and Radiology Technicians employed by the Respondent, at the Hospital located in Cotto Laurel Ward, Ponce, Puerto Rico; excluding all other hospital employees, including Executives, Administrators, Supervisors, Administrative Employees, Managers and Guards as defined by the Act.

(b) Making any changes in wages, hours, or other terms and conditions of employment of the employees represented by the Union without first bargaining with the Union as their exclusive collective-bargaining representative.

(c) Unilaterally changing the terms and conditions of employment of its respiratory therapy technicians by subcontracting their work to per diem employees without first notifying the Union and giving it an opportunity to bargain.

(d) Promulgating, maintaining, or enforcing a rule that unlawfully prohibits employees from having discussions related to the Respondent's plan to subcontract the work performed by its respiratory therapy technicians.

(e) Unilaterally discharging respiratory therapy technicians and subcontracting their work to Respiratory Therapy Management without first notifying the Union about its decision and affording the Union an opportunity to bargain over the decision and effects on the respiratory therapy technicians.

(f) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Before implementing any changes in wages, hours, or other terms and conditions of employment of unit employees, notify and, on request, bargain with the Union as the exclusive collective-bargaining representative of the bargaining unit employees.

(b) Discontinue subcontracting the work of its respiratory therapy technicians and bargain with the Union as the exclusive bargaining representative of the respiratory therapy technicians over any decision to subcontract.

(c) Rescind and give no effect to the work rule prohibiting employees from having discussions related to the Respondent's plan to subcontract the work of its respiratory therapy technicians.

(d) Rescind the change of subcontracting the work of respiratory therapy technicians to per diem employees unilaterally implemented on March 25, 2011.

(e) Make Rafael Colon, Mirna Leon, Jose Cruz, Nancy Gonzalez, Norma Rivera, Felicita Leon, Catherine Co-

[1] The Respondent has excepted to some of the judge's credibility findings. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings.

We shall modify the judge's recommended Order to conform to the Board's standard remedial language and substitute a new notice to conform to the Order as modified.

Unlike his colleagues, Member Hayes would find that the Respondent established that subcontracting unit work to per diem employees starting in March 2011 was consistent with its past practice of using per diem employees, and therefore lawful under *Westinghouse Electric Corp.*, 150 NLRB 1574 (1965).

[2] The judge recommended a broad order requiring the Respondent to cease and desist from violating the Act "in any other manner." But because the Respondent's repeated violations of the Act have been primarily unilateral changes to the bargaining unit's terms and conditions of employment, any future unlawful unilateral changes would be in violation of a narrow order and subject to contempt proceedings. See, e.g., *Metta Electric*, 349 NLRB 1088, 1088 (2007). Therefore, we substitute a narrow order requiring the Respondent to cease and desist from violating the Act "in any like or related manner." See *Hickmott Foods*, 242 NLRB 1357 (1979).

lon, Enid Ortiz, Ivette Borrero, and German Mercado whole for any loss of earnings and other benefits suffered as a result of the Respondent's unlawful decision to subcontract the work of the respiratory therapy technicians to per diem employees on or about March 25, 2011, in the manner as set forth in the remedy section of the decision.

(f) Rescind the discharges of the respiratory therapy technicians and the change of subcontracting the work of the respiratory therapy technicians to Respiratory Therapy Management unilaterally implemented on July 8, 2011.

(g) Within 14 days from the date of this Order, offer Rafael Colon, Mirna Leon, Jose Cruz, Nancy Gonzalez, Norma Rivera, Felicita Leon, Catherine Colon, and Enid Ortiz full reinstatement to their former jobs or, if those jobs no longer exist, to substantially equivalent positions, without prejudice to their seniority or any other rights or privileges previously enjoyed.

(h) Make Rafael Colon, Mirna Leon, Jose Cruz, Nancy Gonzalez, Norma Rivera, Felicita Leon, Catherine Colon, and Enid Ortiz whole for any loss of earnings and other benefits suffered as a result of the Respondent's unlawful decision to subcontract the work of the respiratory therapy technicians to Respiratory Therapy Management on or about July 8, 2011, in the manner set forth in the remedy section of the decision.

(i) Within 14 days from the date of this Order, remove from its files any reference to the unlawful discharges, and within 3 days thereafter, notify the employees in writing that this has been done and that the discharges will not be used against them in any way.

(j) Preserve and, within 14 days of a request, or such additional time as the Regional Director may allow for good cause shown, provide at a reasonable place designated by the Board or its agents, all payroll records, social security payment records, timecards, personnel records and reports, and all other records, including an electronic copy of such records if stored in electronic form, necessary to analyze the amount of backpay due under the terms of this Order.

(k) Within 14 days after service by the Region, post at its Ponce, Puerto Rico facility copies of the attached notice marked "Appendix."[3] Copies of the notice in English and Spanish, on forms provided by the Regional Director for Region 13, after being signed by the Respondent's authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places, including all places where notices to employees are customarily posted. In addition to physical posting of paper notices, notices shall be distributed electronically, such as by email, posting on an intranet or an internet site, and/or other electronic means, if the Respondent customarily communicates with its employees by such means. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. If the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since March 25, 2011.

(l) Within 21 days after service by the Region, filed with the Regional Director for Region 24 a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this notice.

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist a union

Choose representatives to bargain with us on your behalf

Act together with other employees for your benefit and protection

Choose not to engage in any of these protected activities.

WE WILL NOT fail and refuse to recognize and bargain with Unidad Laboral De Enfermeras(os) y Empleados De La Salude (the Union) as the exclusive collective-bargaining representative of our employees in the following bargaining unit:

> Unit B—24–RC–7308: All Licensed Practical Nurses and Respiratory Therapy Technicians, Operating Room and Radiology Technicians employed by the Respondent, at the Hospital located in Cotto Laurel Ward, Puerto Rico; excluding all other hospital employees, including Executives, Administrators, Supervisors, Adminis-

[3] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

trative Employees, Managers and Guards as defined by the Act.

WE WILL NOT change your terms and conditions of employment without first notifying the Union and giving it an opportunity to bargain.

WE WILL NOT subcontract the work of our respiratory therapy technicians without first notifying the Union about our decision and affording the Union an opportunity to bargain over the decision and its effects on our respiratory therapy technicians.

WE WILL NOT promulgate, maintain, or enforce rules that unlawfully prohibit employees from having discussions related to plans to subcontract the work performed by our respiratory therapy technicians.

WE WILL NOT unilaterally discharge and subcontract the work of our respiratory therapy technicians without first bargaining with the Union to a good-faith impasse.

WE WILL NOT in any like or related manner, interfere with, restrain, or coerce you in the exercise of the rights listed above.

WE WILL, before implementing any changes in wages, hours, or other terms and conditions of employment of unit employees, notify and, on request, bargain with the Union as the exclusive collective-bargaining representative of our bargaining unit employees.

WE WILL discontinue subcontracting the work of our respiratory therapy technicians and bargain with the Union as the exclusive-bargaining representative of the respiratory therapy technicians over any decision to subcontract.

WE WILL immediately rescind and give no effect to the work rule prohibiting employees from having discussions related to our plan to subcontract the work performed by our respiratory therapy technicians.

WE WILL rescind the change of subcontracting the work of our respiratory therapy technicians to per diem employees unilaterally implemented on March 25, 2011.

WE WILL make Rafael Colon, Mirna Leon, Jose Cruz, Nancy Gonzalez, Norma Rivera, Felicita Leon, Catherine Colon, Enid Ortiz, Ivette Borrero, and German Mercado whole for any loss of earnings and other benefits resulting from our March 25, 2011 decision to subcontract unit work in the respiratory therapy department, less any net interim earnings, plus interest compounded daily.

WE WILL rescind the discharges of our respiratory therapy technicians and the change of subcontracting their work to Respiratory Therapy Management unilaterally implemented on July 8, 2011.

WE WILL, within 14 days from the date of this Order, offer Rafael Colon, Mirna Leon, Jose Cruz, Nancy Gonzalez, Norma Rivera, Felicita Leon, Catherine Colon, and Enid Ortiz full reinstatement to their former jobs, or, if those jobs no longer exist, to substantially equivalent positions, without prejudice to their seniority or any other rights or privileges previously enjoyed.

WE WILL make Rafael Colon, Mirna Leon, Jose Cruz, Nancy Gonzalez, Norma Rivera, Felicita Leon, Catherine Colon, and Enid Ortiz whole for any loss of earnings and other benefits resulting from their discharge on July 8, 2011, less any net interim earnings, plus interest compounded daily.

WE WILL, within 14 days from the date of the Board's Order, remove from our files any reference to the unlawful discharges of Rafael Colon, Mirna Leon, Jose Cruz, Nancy Gonzalez, Norma Rivera, Felicita Leon, Catherine Colon, and Enid Ortiz, and WE WILL, within 3 days there after, notify each of them in writing that this has been done and that the discharges will not be used against them in any way.

QUALITY HEALTH SERVICES OF PUERTO RICO D/B/A HOSPITAL SAN CRISTOBAL

Jose Ortiz-Marciales, Esq., for the Acting General Counsel.
Jose Oliveras Gonzalez, Esq., for the Respondent.
Harold Hopkins Jr., Esq., for the Charging Party.

DECISION

STATEMENT OF THE CASE

GEOFFREY CARTER, Administrative Law Judge. This case was tried in San Juan, Puerto Rico on November 17–18 and December 13–15, 2011. The Unidad Laboral de Enfermeras(os) y Empleados de la Salud (the Union) filed the charge in Case 24–CA–11782 on April 12, 2011, and filed an amended charge on August 19, 2011.[1] The Union filed the charge in Case 24–CA–11884 on June 29, 2011, and filed an amended charge on August 19, 2011. The Acting General Counsel issued a consolidated complaint (covering both cases) on August 31, 2011, and amended the complaint on October 20 and November 17, 2011.

The complaint alleges that Quality Health Services of Puerto Rico, Inc., d/b/a Hospital San Cristobal (the Respondent or the Hospital) violated Section 8(a)(1) of the National Labor Relations Act (the Act) by issuing and distributing a memorandum to employees on or about March 31, 2011, that prohibited any discussions between employees related to the Respondent's subcontracting of work performed by its respiratory therapy technicians. The complaint also alleges that the Respondent violated Section 8(a)(5) and (1) of the Act by: on or about March 28, 2011, unilaterally subcontracting work performed by respiratory therapy technicians; on or about April 4, 2011, unilaterally changing its past practice for scheduling vacation for respiratory therapy department employees by eliminating and/or limiting employee discretion when scheduling vacation leave; and on or about July 9, 2011, unilaterally laying off res-

[1] All dates are in 2011, unless otherwise indicated.

piratory therapy technicians and subcontracting the work that they previously performed. The Respondent filed a timely answer denying each of the alleged violations in the complaint.

On the entire record,[2] including my observation of the demeanor of the witnesses, and after considering the briefs filed by the Acting General Counsel and the Respondent, I make the following

FINDINGS OF FACT

I. JURISDICTION

The Respondent, a corporation, operates a hospital that provides acute health care services in Ponce, Puerto Rico, where it annually derives gross revenues in excess of $250,000 and purchases and receives goods valued in excess of $50,000 directly from points outside of the Commonwealth of Puerto Rico. The Respondent admits, and I find, that it is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act and that the Union is a labor organization within the meaning of Section 2(5) of the Act.

II. ALLEGED UNFAIR LABOR PRACTICES

A. Background Facts

This case is the third case that the Respondent, the Union and the Acting General Counsel have litigated in the past 18 months. See *Hospital San Cristobal*, 356 NLRB 699 (2011) (Case 24–CA–011438); *Hospital San Cristobal*, Case 24–CA–11630, slip op. (July 21, 2011). I have summarized portions of the decisions in the two preceding cases because they provide some useful background information for the complaint allegations at issue in this case, and are also relevant to the Acting General Counsel's request for a broad remedial order.

1. Overview

Since about March 1, 2002, the Union has served as the exclusive collective-bargaining representative of the following bargaining unit (among others) at the Hospital:

> Unit B—24–RC–7308: All Licensed Practical Nurses and Respiratory Therapy Technicians, Operating Room and Radiology Technicians employed by the Respondent, at the Hospital located in Cotto Laurel Ward, Ponce, Puerto Rico; excluding all other hospital employees, including Executives, Administrators, Supervisors, Administrative Employees, Managers and Guards as defined in the Act.

The Union and Respondent have been parties to a series of collective-bargaining agreements since March 1, 2002, though the most recent collective-bargaining agreement expired on February 28, 2010.

In 2009, a decrease in the number of patients led the Hospital to consider and implement various cost-cutting measures. *Hospital San Cristobal*, 356 NLRB at 700. As described below, the Acting General Counsel alleged (in Cases 24–CA–011438 and 24–CA–011630) that the Hospital ran afoul of Section 8(a)(5) and (1) of the Act because it did not fulfill its duty to bargain with the Union before implementing some of the cost-cutting measures and policy changes that it selected.

2. Decision in Hospital San Cristobal, 356 NLRB 699 (Case 24–CA–11438)

In Case 24–CA–011438, the Board affirmed Administrative Law Judge William Cates' finding that the Respondent violated Section 8(a)(5) and (1) of the Act "by altering its past practice and ceasing to pay holiday pay to employees whose day off fell on a holiday, by eliminating its past practice of allowing employees to use sick leave when receiving workers' compensation, by eliminating permanent shifts in its respiratory care department thereby implementing rotation shifts for those employees, and by changing and reducing the number of employees' holidays, all without notice to and bargaining with the Union." *Hospital San Cristobal*, 356 NLRB at 699, 703 (noting that the violations occurred between late 2009 and early 2010). To remedy those violations, the Board (among other things) ordered the Respondent to rescind the unlawful unilateral changes and make employees whole for any lost wages or benefits, with interest. Id.703–704.

3. Decision in *Hospital San Cristobal*, Case 24–CA–011630

In Case 24–CA–011630, Administrative Law Judge George Aleman found that the Respondent violated Section 8(a)(5) and (1) of the Act by unilaterally discontinuing (on March 1, 2010) its practice of paying certain nursing employees incentives or bonuses[3] on top of their base salary rate without giving the Union prior notice or an opportunity to bargain over that change in its employees' terms and conditions of employment. *Hospital San Cristobal*, Case 24–CA–011630, supra at 706. Judge Aleman ordered the Respondent to reinstate the unlawfully discontinued employee compensation practices, and make employees whole for any lost wages (plus interest) caused by the 8(a)(5) violation. Id.at 706–707.

B. Hospital Identifies the Respiratory Therapy Department as an Area for Savings

In connection with the Hospital's ongoing efforts to reduce costs, respiratory therapy department Supervisor Carlos Diaz suggested in January 2011 that the Hospital consider subcontracting out the respiratory therapy department. (Tr. 40, 185, 193–195.) After reviewing proposals from various subcontractors, the Hospital identified Respiratory Therapy Management (RTM) as the subcontractor that was offering the most affordable package. (Jt. Exh. 21; GC Exh. 4.) Specifically, the Hospital's initial studies indicated that it would save approximately $100,000 per year if it used RTM to provide the Hospital's respiratory therapy services (instead of continuing to use the

[2] The trial transcripts are generally correct, but I note the following corrections for the record: p. 135, L. 9 ("individual" should be "mind"); and p. 202, LL. 22–23 ("January 14" should be "February 14"). I also note that General Counsel (GC) Exhibit 5 was included in the trial exhibits in error (the exhibit was never offered or admitted into evidence) and is not part of the evidentiary record.

[3] The Respondent paid incentives or bonuses to employees who worked undesirable shifts, worked in high risk departments of the hospital, or completed special courses to improve their knowledge and skills. *Hospital San Cristobal*, Case 24–CA–011630, supra at 700.

respiratory therapy employees that it had on the payroll).[4] (Tr. 377–378; Jt. Exh. 5b at 2.)

C. Negotiations Regarding the Respiratory Therapy Department

1. The Hospital offers to bargain about the impact of its decision to subcontract

On March 15, Hospital Executive Director Pedro Benetti sent a letter to the Union to advise that the Hospital planned to subcontract the respiratory therapy department effective April 15, 2011, and to invite the Union to negotiate about the impact of that decision. (Jt. Exh. 3b.) The pertinent part of Benetti's March 15 letter stated as follows:

> As you know, since last year the Hospital has been going through a declining situation that has directly affected the finances of our operations. More so, our negotiations have also been affected, since the hospital does not have the economic capacity to enter into economic commitments.
>
> Due to this situation, the Hospital has been looking for alternatives that would help our finances such as the reorganization of services, the restructuring of departments, the consolidation of positions, not substituting resignations or terminations, not incurring overtime, etc.
>
> One of the alternatives we have evaluated is the subcontracting of services. [Subcontracting is an] alternative that at this moment we see as viable with the Respiratory Care Department, because it represents a savings for the Hospital. We will begin privatizing these services beginning on April 15, 2011. It is because of this, that I invite you to negotiate the impact of this decision, in a meeting set for Thursday, March 24, 2011 at 10:00 a.m. in Conference Room B.

(Jt. Exh. 3b; see also Tr. 41–42, 255–256.)

2. The Hospital agrees to have a subcontractor provide respiratory therapy staff on a per diem basis

In the initial days following the Hospital's announcement of its plans to subcontract the respiratory therapy department, much of the communication between the Hospital and the Union (including the March 24 meeting attended by hospital and union representatives) focused on the Union's requests for information to evaluate the Hospital's financial status and the estimated savings that would result from subcontracting. (See, e.g., Jt. Exhs. 5b, 6b, 7b, 13b, 14b, 17b, 18b.) The Hospital also continued to assert that it was only willing to negotiate about the impact of its decision to subcontract. (Jt. Exh. 8b, par. 1.)

In the same time period, however, significant changes occurred in the respiratory therapy department. First, on March 25, the Hospital agreed to subcontract with RTM to provide nonunion respiratory therapy technicians on a per diem (i.e., as needed) basis.[5] (Tr. 48, 82, 85–86; see also Tr. 226–227; Jt. Exh. 9b (Union asked Hospital why RTM was providing respiratory therapy technicians to the Hospital when negotiations about that issue were still in progress); Jt. Exh. 30b at 2).) Specifically, beginning on March 28, RTM provided respiratory therapy technicians to cover shifts that, according to the Hospital, could not be staffed by Hospital employees because of vacation time, disability leave under the State Insurance Fund program (a workers' compensation program), sick leave, the reduced number of full-time staff in the department, and shift assignment restrictions that resulted from prior litigation before the National Labor Relations Board (the Board). (Tr. 83, 124, 226–227; Jt. Exh. A, par. 4; Jt. Exhs. 9b, 18b, 20b.) Although the collective-bargaining agreement permits the Hospital to hire "temporary employees" to work in an emergency or substitute for a regular employee who is absent due to illness, vacation or any similar circumstance (see Jt. Exh. 1b, par. A), Human Resources Director Candie Rodriguez testified that the per diem employees that RTM provided were not temporary employees, but rather "people who are on standby waiting to cover shifts that may come up . . . at a last minute."[6] (Tr. 83.)

Second, in late March and early April, three respiratory therapy technicians employed by the Hospital resigned, reducing the number of full-time technicians in the respiratory therapy department from 11 to 8.[7] (Jt. Exh. A, pars. 3, 5–6; see also Tr. 89 (Hospital did not attempt to fill the positions that became vacant due to the three resignations).) One of the eight remaining technicians (Felicita Leon) was not available to work be-

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[4] Revised studies later showed that the Hospital would save approximately $60,000 per year if it used RTM to staff the respiratory therapy department. (Tr. 336, 378.)

[5] Although RTM agreed to provide respiratory therapy technicians to the Hospital on March 25, the Hospital and RTM did not sign a contract until April 7. (Jt. Exh. 15.) Since the contract contemplated RTM providing staff for the entire respiratory therapy department, the Hospital and RTM agreed by letter that until further notice, RTM would only provide staffing on a per diem basis. (Tr. 48, 103; Jt. Exh. 30b at 2).)

[6] Rodriguez' testimony that per diem employees are not temporary employees covered by the collective-bargaining agreement was unrebutted. Notably, Rodriguez initially stated that per diem employees were temporary employees, and then interjected to correct herself and emphasize that per diem employees are not temporary employees. (Tr. 83.)

The record does not establish why Rodriguez felt compelled to correct her initial answer, but I note that the collective-bargaining agreement does outline specific conditions that apply when the Hospital uses temporary employees. (See Jt. Exh. 1b, pars. B, F (among other conditions, the collective-bargaining agreement generally allows the Hospital to use temporary employees for a continuous period of work of up to 6 months, and requires the Hospital to give regular employees preference over temporary employees in covering vacant positions for which they are qualified).)

Historically, the Hospital used temporary employees sparingly in the respiratory therapy department, with only two such employees covering shifts in 2010 (up to August 2010), and none in 2011 (up to March 28, 2011). (Jt. Exh. 52.) By contrast, between March 28 and April 23, 2011, the Hospital used eight different per diem employees (provided by RTM) to cover various shifts in the respiratory therapy department. (GC Exh. 2b.)

[7] One respiratory therapy technician (Wanda Batista) resigned with an effective date of March 23, while the other two respiratory therapy technicians (German Mercado and Ivette Borrero) resigned with effective dates of April 15 and 16. (Jt. Exh. A, pars. 3, 5–6.) There is no allegation in this case that any of the three resignations were caused by unfair labor practices.

cause of ongoing disability leave (under the State Insurance Fund) that began in December 2010. (Tr. 86–87, 187.)

3. The Hospital issues a memorandum prohibiting employees from making certain comments about subcontracting

On March 31, Rodriguez sent a letter to Union Representative Ariel Echevarria to follow up on concerns that she raised in a March 30 meeting with Echevarria and Union Delegate (and Hospital employee) Evelyn Santa about certain incidents at the Hospital. (Jt. Exh. 11b; see also Jt. Exh. 10b (Echevarria letter referencing the meeting).) Rodriguez expressed concern that an unknown individual had left a "menacing note" on Carlos Diaz' car because Diaz proposed the idea of subcontracting the respiratory therapy department. Rodriguez also asserted that Santa and Union Delegate Rafael Colon were intimidating other hospital employees by warning that their departments could also be targeted for subcontracting. Rodriguez informed Echevarria that she circulated a memo to employees that prohibited the conduct that she described. (Jt. Exh. 11b.) Rodriguez' memo to employees (dated March 31) stated as follows:

> Operational Changes—For several days now, we have been hearing that employees are intimidating other employees with comments that lack truthfulness and which only have the intention of affecting their emotional health. These employees have to desist from making these comments immediately. At this time, the Hospital is in the process of taking a decision that will only affect one (1) department. No other department of the Hospital will be affected nor are we thinking of affecting any other department. This is a product of operational decisions that impact the finances of the Hospital. I have instructed all Supervisors, and I urge everyone, to report to me those employees that are incurring in this conduct in order to take the necessary corrective measures.

(Jt. Exh. 12b.)

4. Rafael Colon's vacation dates changed

At the start of every year (including 2011), Diaz presented a form to the respiratory therapy technicians and ask them to fill it out with their requested vacation time. (Tr. 177, 294–295; Jt. Exh. 55b.) Employees, however, were not guaranteed their first choices of vacation times. Instead, Diaz would review the requests to ensure that they did not conflict with the requests of other employees, and to ensure that employees did not go past the collective-bargaining agreement's 16-month limit for accruing (and using) vacation leave. (Tr. 178–179; see also Jt. Exh. 2b, par. F; see also Jt. Exh. 54 (noting that annual vacation programs take into consideration the date of hire of employees, and the needs of the department, Hospital and service).) If a conflict did arise, Diaz would arrange a meeting with the affected employee and attempt to work out an agreement for an alternative vacation time. (Tr. 179–180, 295–296.) Rafael Colon testified that he had never experienced an occasion in the past where he and Diaz could not come to an agreement about an alternative vacation time.[8] (Tr. 307.)

On April 4, Diaz met with Rafael Colon to discuss Colon's request to take vacation in December 2011. At the meeting, Diaz advised Colon that he would need to take his vacation from April 11 to May 10, 2011, instead of waiting until December 2011. (Tr. 184, 297–298.) Diaz explained (at trial) that under the collective-bargaining agreement, Colon had to take a vacation (or forfeit his vacation leave) every 16 months and generally take vacation in one block of consecutive days.[9] Since Colon's last vacation ended on February 14, 2010, he was approaching the end of the 16-month timeframe to use his accrued vacation leave.[10] (Tr. 202, 205, 213, 216; Jt. Exh. 2b, pars. F–G.) Colon asked Diaz if perhaps another employee could take vacation in April, but Diaz responded that Colon needed to go on vacation at that time.[11] (Tr. 298.) Diaz then produced a completed vacation leave request form for Colon with the April/May dates, and Colon (believing he had no alternative) signed the form. (Tr. 184–185, 298–299; Jt. Exh. 57b.) Although Colon was familiar with the human resources office and the grievance process, he did not complain to the human resources office about the change to his vacation schedule. (Tr. 305.)

5. The Hospital offers to bargain about whether it should subcontract the respiratory therapy department

On April 7, RTM and the Hospital signed a contract for RTM to provide respiratory therapy technicians to the Hospital. (Jt. Exh. 15b.) However, by letter, RTM and the Hospital agreed that until negotiations with the Union concluded, RTM would only provide staff on a per diem, or as needed, basis. (Tr. 48, 103.)

In this same time period, the Hospital consulted with its attorney and learned that it needed to negotiate with the Union

[8] I have not credited Rafael Colon's testimony that all employees in the respiratory therapy department were given the flexibility to select alternative vacation dates in the event that their first choice could not be granted. (See Tr. 295–296.) No foundation was offered for Colon's testimony on that point, thus raising questions about the reliability of that portion of Colon's testimony. Furthermore, although the Acting General Counsel called two other respiratory therapy department employees as witnesses in its rebuttal case, it did not ask either of those employees to present testimony that might have rebutted Diaz' testimony (and perhaps corroborated Rafael Colon's testimony) about the Hospital's vacation leave scheduling practices. (See Tr. 459–464 (Jose Cruz); 464–472 (Catherine Colon).)

[9] Although the collective-bargaining agreement does not limit the number of vacation days that an employee may accrue, Diaz testified that he used the number of accrued vacation days as a benchmark for determining when an employee was approaching the 16-month forfeiture date for vacation leave. (Tr. 198, 212.) Specifically, for an employee (like Colon) who earned 22 vacation days a year (1.83 days per month), Diaz regarded 28–30 days of accrued vacation leave as a signal that such an employee was at risk of forfeiting leave because of the 16-month limitation on accruing leave. (Tr. 198, 212; Jt. Exh. 2b, pars. A(3), F.)

[10] Under the collective-bargaining agreement, Colon had until June 14, 2011 to use or forfeit his vacation leave. The record shows that two other respiratory therapy technicians were scheduled to take vacation leave from May 9 to June 8. (Jt. Exh. 56.)

[11] Colon testified that Diaz became upset during this part of the conversation and that he (Colon) felt intimidated because Diaz spoke to him with a tone of voice he had never heard before. Colon admitted, however, that Diaz did not shout at him, become violent or point his finger at Colon during the discussion. (Tr. 298, 305–306, 311.)

not only about the impact of a decision to subcontract the respiratory therapy department, but also about whether it should make such a decision at all. (Tr. 119–120). Acting on that advice, Candie Rodriguez notified the Union in an April 12 bargaining meeting that the Hospital would evaluate any alternatives to subcontracting that the Union proposed.[12] (Jt. Exh. 19b at 3; Tr. 257, 261.) Further, on April 14, Rodriguez notified the Union that the Hospital was going to postpone the effective date of its plan to subcontract the respiratory therapy department to April 30, to afford the Union time to review information that the Hospital provided and to propose alternatives to subcontracting for the Hospital to consider. (Jt. Exh. 22; Tr. 47.)

6. The parties identify a potential alternative to subcontracting

From mid-April to late May 2011, negotiations between the Hospital and the Union primarily focused on exchanging information about the Hospital's subcontracting plan and questions about the accuracy of the Hospital's calculations of the savings that would result from subcontracting.[13] (See Jt. Exhs. 23b, 25b–32b.) The Hospital also again postponed the effective date of its subcontracting plan. (See Jt. Exh. 24b (effective date postponed to May 31).)

On May 27, a breakthrough of sorts occurred when Rodriguez and Echevarria met informally and came up with the idea that as an alternative to the Hospital's subcontracting plan, the Hospital could save money by reducing the $55 monthly meal stipend that it was paying to 185 Union employees under the collective-bargaining agreement. (Tr. 62–64, 227–229; see also Jt. Exh. 33b at 2–3 (effective date for subcontracting postponed to June 20).) In a June 17 letter, Rodriguez estimated that the Hospital could save $7,400 per month if the meal stipend was reduced to $15 a month per employee, or save $10,175 per month if the meal stipend was eliminated altogether.[14] Rodriguez added that if the parties agreed to the meal stipend reduction alternative, the Hospital could retain the eight regular employees in the respiratory therapy department, but would need to continue using RTM to provide per diem employees and would not be able to assign any of the regular employees to permanent shifts.[15] (Jt. Exh. 35b (providing analysis of meal stipend reduction alternative, and postponing the effective date for subcontracting to July 1).)

In late June 2011, the Union renewed its request that the Hospital correct its analysis of the savings that would result from subcontracting the respiratory therapy department, because the Hospital's initial studies failed to account for the reduction in regular staff in the department to eight employees in 2011. (Jt. Exhs. 36b, 37b at 3 (noting that the department had 15 regular employees in 2009, and 11 regular employees in 2010); see also Tr. 123 (explaining why the Hospital needed to do multiple studies of the expected savings from subcontracting).) The Hospital agreed to postpone the effective date for its subcontracting plan to the week of July 4 to allow time for further analysis and discussion. (Jt. Exh. 41b.)

On or about July 5, the Hospital produced an updated study that concluded that the Hospital would save $4,998 per month if it subcontracted the entire respiratory therapy department (when compared to the status quo of retaining eight regular employees and continuing to use RTM to provide per diem employees). (GC Exh. 3a; Jt. Exh. 43b; Tr. 73, 128–129, 277–278.) The Union agreed that the Hospital's calculations were accurate, and thus the negotiations turned to whether the parties could devise an alternative plan that would produce comparable savings to the Hospital's subcontracting plan.[16] (Tr. 277–278.) The parties agreed to meet on July 8 with the goal of finally reaching an agreement about the respiratory therapy department. (Jt. Exh. 43b.)

7. The Union offers to reduce the monthly meal stipend as an alternative to subcontracting

In the morning on July 8, the Union offered (as an alternative to subcontracting) to reduce the monthly meal stipend per employee from $55 to $30, which would produce a savings for the Hospital of $4,625 per month. However, the Union specified the following conditions for its offer:

> (1) The Hospital would hire Union employees to fill any future vacancies that arose in the Respiratory therapy department, such that the department would continue to have eight regular employees;
>
> (2) The Union and Hospital would agree to meet every trimester to verify that the Hospital's savings from the meal stipend reduction were consistent with its calculations;
>
> (3) The Hospital would increase the meal stipend if the Hospital saved more money than projected;

[12] I do not credit Rodriguez' testimony that she told the Union that the Hospital would consider alternatives to subcontracting in the March 24 bargaining meeting. (Tr. 120.) The bargaining minutes that Rodriguez prepared for March 24 do not mention any such offer to consider alternatives. (Jt. Exh. 5b.) By contrast, Rodriguez did mention the Hospital's willingness to consider alternatives in the April 12 meeting. (Jt. Exh. 19b at 3.)

[13] In addition to discussing the Hospital's proposal to subcontract the respiratory therapy department, the parties also devoted some time to negotiating about the terms of a new collective-bargaining agreement. (Jt. Exhs. 30b–32b.)

[14] At the time, the Hospital's calculations were that it would save $7,243 per month if it subcontracted the respiratory therapy department. (Tr. 59–60.)

[15] Respiratory therapy technicians work in the following shifts: 7 a.m. to 3 p.m.; 3 to 11 p.m.; and 11 p.m. to 7 a.m. Employees with permanent shifts were always assigned to the same shift on the schedule (e.g., always to the morning shift), while employees with rotating shifts could be assigned to any of the three shifts. (Tr. 82, 112.)

[16] At the same time, the Hospital was growing impatient because while negotiations proceeded, it continued to pay the salaries of the eight regular employees in the respiratory therapy department plus the fees that RTM charged for providing staff on a per diem basis. (Jt. Exh. 43b.) Because of that fact, on July 6 the Hospital notified the Union that it planned to withhold meal stipend payments that were due on July 7. (Id.) The Union opposed the Hospital's decision not to pay the meal stipend. (Jt. Exh 44b.) I infer that the Hospital conceded on this issue, because there is no evidence that the Hospital followed through with withholding the meal stipend as suggested in its July 6 letter.

(4) The reduction to the meal stipend would last for one year;

(5) The Hospital would grant employees Rafael Colon and Mirna Leon permanent shifts from 7:00 am to 3:00 pm.

(Jt. Exhs. 45b, 47b, 48b.)

8. The Hospital rejects the Union's offer and decides to subcontract the respiratory therapy department

After the morning session, Rodriguez discussed the Union's offer with Executive Director Benetti. At approximately 2 p.m., Rodriguez notified the Union that it would not accept any of the proposed conditions. Continuing, Rodriguez notified the Union that the Hospital had decided to subcontract the entire respiratory therapy department (and discharge the regular employees in that department). Specifically, Rodriguez stated:

> I am notifying [you] that the hospital has made its decision to subcontract the Respiratory Care Department and conforming to the collective [bargaining] agreement, I am notifying [you] that the effective date will by July 13th[.] The employees will be notified today, July 8th and will work no more. However, they will be paid as worked days until the effective date of end of employment.

(Jt. Exh. 45b at 2; see also Tr. 236–238; Jt. Exh. 49b.)

9. The Hospital discharges the regular employees in the respiratory therapy department

After sending its letter, the Hospital began notifying the eight regular employees in the respiratory therapy department that they were being discharged.[17] Employees who were working the 7 a.m. to 3 p.m. shift that day were instructed to report to the human resources office at the end of their shift, where Rodriguez (assisted by Diaz) informed them of their termination. Similarly, the Hospital directed employees who were arriving to work 3 to 11 p.m. shift to report immediately to the human resources office where they were advised that they were being terminated (the vacated shifts were covered by RTM staff). Finally, the Hospital called all off-duty employees for the department and terminated them when they arrived at the human resources office as instructed. During the termination meetings, the Hospital collected the employees' hospital keys and identification badges, and presented them with a discharge letter that stated (in pertinent part) as follows:

> After a reasonable time period has passed in the negotiation process, without [the Union] being able to reach feasible agreements for the Hospital, we regret to have to inform you today that we have made the final decision to subcontract the employee services through the company Respiratory Therapy Management. In conformance with the Collective Bargaining Agreement, I inform you that the effective date is Wednesday, July 13, 2011, although you will work until today. Notwithstanding, you will be paid until July 13, 2011. . . . We will be communicating to you if new opportunities emerge in your specific area, or in another area for which you qualify. Should you accept [working] with us again . . . [w]e will then be making arrangements for the company RTM for them to call you for an interview. Notwithstanding, the right to offer you an opportunity for employment lies with the Company.

(Jt. Exhs. A, par. 7, 46b; Tr. 157–158, 300–302, 392–393, 459–461, 465–467.)[18]

10. The parties agree to meet for another bargaining session

Later in the afternoon on July 8, Union President Ana Melendez faxed Rodriguez a letter (and also telephoned Rodriguez) to emphasize that the Union was available to continue negotiations until any hour necessary to reach a satisfactory agreement with the Hospital concerning the respiratory therapy department. (Jt. Exh. 48b; Tr. 238.) Rodriguez, who was finishing up her last couple of discharge meetings with respiratory therapy technicians, agreed to meet again with the Union at the Hospital at 5 p.m. (Tr. 81, 239, 242.) Rodriguez mentioned to two or three respiratory therapy technicians who were still in the human resources office that she would be attending another meeting with the Union, but did not rescind or delay their discharges.[19] (Tr. 466–467; see also Tr. 462.)

In the evening meeting on July 8, Rodriguez began by reviewing the conditions that the Union included with its offer to agree to a lower monthly meal stipend. Rodriguez explained that the Hospital was fine with the proposed condition that it fill any future vacancies in the respiratory therapy department with union personnel (instead of RTM staff), but opposed: (a) having meetings every trimester to verify that the Hospital was meeting its savings targets; (b) reducing the monthly meal stipend to $30 per employee (the Hospital wanted a larger reduction); (c) increasing the meal stipend if the Hospital reached or exceeded its savings targets; (d) limiting the reduction in the meal stipend to only 1 year;[20] and (e) granting permanent shift assignments to Rafael Colon and Mirna Leon. (R. Exh. 4 at 2.) In response, the Union made the following new proposal:

(1) The Hospital would hire Union employees to fill any future vacancies that arose in the Respiratory therapy depart-

[17] The eight respiratory therapy technicians that the Hospital discharged were: Rafael Colon; Mirna Leon; Jose Cruz; Nancy Gonzalez; Norma Rivera; Felicita Leon; Catherine Colon; and Enid Ortiz. (See Jt. Exhs. 5b at 1–2; 56.)

[18] The collective-bargaining agreement requires 3 days advance notice to employees who are being terminated. (Tr. 158, 409.) Diaz admitted that although the employees were paid until July 13, the employees no longer worked for the hospital as of July 8. (Tr. 382–383.)

[19] I do not credit Rodriguez' testimony that she advised employees that they would return to work if the Union and the Hospital reached an agreement in the evening negotiations. (See Tr. 430, 447–448.) Rodriguez was inconsistent when asked about the number of employees that she told about the evening meeting with the Union, and she did not document any change in the status of the employees (regarding their terminations) in the Hospital's records. (Tr. 447–448.) To the contrary, all eight respiratory technicians received discharge letters and were required to turn in their keys and identification badges in the afternoon on July 8, notwithstanding any further negotiations with the Union that were planned for later in the evening. (Jt. Exh. 46b; Tr. 300–302, 392–393, 459–461, 465–467.)

[20] The Union clarified that it only meant that after a 1-year period, the parties should assess whether the meal stipend should return to its original $55 per month amount, or continue on at the lower amount. Rodriguez indicated that with that clarification, the Hospital found that condition acceptable. (R. Exh. 4 at 2.)

ment, such that the department would continue to have eight regular employees;

(2) The Union and the Hospital agree to reduce the monthly meal stipend from $55 to $27.50 per employee, which would produce a monthly savings of $5,087.50 for the Hospital (a higher amount of savings than subcontracting would have produced);

(3) The Union and the Hospital agree to meet in one year to evaluate the agreement about the monthly meal stipend and assess whether any adjustments should be made;

(R. Exh. 4 at 3; see also Jt. Exh. 49b; Tr. 131–132, 245–246.)[21] Rodriguez countered that if the Union agreed to reduce the monthly meal stipend to $25 per employee, the Hospital would ensure that only RTM staff covered the 11 to 7 a.m. shift (leaving the regular employees in the department to rotate between the 7 a.m. to 3 p.m. shift and the 3 to 11 p.m. shift). (R. Exh. 4 at 3–4; Tr. 132.) Union President Melendez replied that the Union would not agree to reduce the monthly meal stipend to $25 unless the Hospital granted permanent shift assignments to Colon and Leon. When Rodriguez reiterated that the Hospital's final position was that the monthly meal stipend be reduced to $25 and regular department employees all rotate between the first two shifts (with no permanent shifts), the meeting ended at 8:11 p.m. without an agreement.[22] (R. Exh. 4 at 5; see also Jt. Exh. 49b; Tr. 132–133, 247, 348, 422.)[23]

11. The Hospital fully subcontracts the respiratory therapy department, while the Union asserts that it remains available to resume negotiations

On July 11, Rodriguez sent the Union a letter containing her summary of the July 8 evening negotiations. (Jt. Exh. 49b.) Union President Melendez responded the same day, primarily to assert that the Union had not closed negotiations and was available to meet with the Hospital whenever Rodriguez was available. (Jt. Exh. 50b.)

The Hospital modified its agreement with RTM on July 14 to have RTM provide all staff for the respiratory therapy department. (Jt. Exh. A, par. 8; R. Exh. 1.) On July 18, the Union responded in more detail to Rodriguez' summary of the July 8 evening negotiation session by providing its own summary of the parties' negotiations. The Union also provided some example schedules to show that it would be feasible for the Hospital to assign Colon and Leon to permanent shifts without compromising the overall schedule. The Union concluded by asking Rodriguez to engage in further dialogue about these issues. (Jt. Exh. 51b; Tr. 289, 428, 442; see also Union (U.) Exhs. 2–3.)

Discussion and Analysis

A. Credibility Findings

A credibility determination may rely on a variety of factors, including the context of the witness' testimony, the witness' demeanor, the weight of the respective evidence, established or admitted facts, inherent probabilities and reasonable inferences that may be drawn from the record as a whole. *Double D Construction Group*, 339 NLRB 303, 305 (2003); *Daikichi Sushi*, 335 NLRB 622, 623 (2001) (citing *Shen Automotive Dealership Group*, 321 NLRB 586, 589 (1996)), enfd. 56 Fed. Appx. 516 (D.C. Cir. 2003); see also *Roosevelt Memorial Medical Center*, 348 NLRB 1016, 1022 (2006) (noting that an ALJ may draw an adverse inference from a party's failure to call a witness who may reasonably be assumed to be favorably disposed to a party, and who could reasonably be expected to corroborate its version of events, particularly when the witness is the party's agent). Credibility findings need not be all-or-nothing propositions—indeed, nothing is more common in all kinds of judicial decisions than to believe some, but not all, of a witness' testimony. *Daikichi Sushi*, 335 NLRB at 622.

In this case, the parties stipulated to several joint exhibits that are not disputed and establish many of the relevant facts. Witness credibility, however, was pivotal in certain areas, and in particular was relevant to the events of July 8, when the parties had their most contentious (and disputed) bargaining sessions. I have outlined my credibility findings in the findings of fact above and in the analysis below. However, as a general matter, I found that portions of Candie Rodriguez' testimony lacked credibility because she provided testimony that stretched the facts to bolster the Respondent's theory of the case. (See, e.g., Findings of Fact (FOF) Section II(C)(9) (discussing Rodriguez's testimony about what she told employees when they were discharged).) Unless otherwise noted, I generally credited the testimony of the other witnesses that the parties presented because the testimony was presented in a forthright manner and was corroborated by other evidence (including the joint exhibits).

B. The March 31 Work Rule Regarding Comments about Subcontracting

1. Complaint allegations and applicable legal standards

The Acting General Counsel alleges that the Hospital violated Section 8(a)(1) of the Act when, on or about March 31, 2011, it issued and distributed a memorandum to employees that prohibited any discussions among employees related to the

[21] The parties momentarily tabled the question of permanent shifts for employees to discuss the other conditions that the Union proposed. (R. Exh. 4 at 3.)

[22] Some of the respiratory therapy technicians who were discharged in the afternoon were present (outside of the meeting room) when the evening bargaining session ended, presumably because they wished to learn the results of the meeting. (Tr. 430; Jt. Exh. 51b at p. 2.) Rodriguez did not speak to any of the discharged employees at that time. (Tr. 430.)

[23] Because the Union and the Hospital could not agree to a joint set of bargaining minutes for the July 8 evening negotiations, the Union and the Hospital prepared separate bargaining minutes. The Union's minutes are fully consistent with the facts recited here. (See R. Exh. 3.) To the extent that there are differences in the two versions, I find that the differences are not material to my analysis. For these reasons, I reject the Respondent's request that I draw an adverse inference from the Acting General Counsel's failure to call the Union President and Executive Director as witnesses. (See R. Posttrial Br. at 22–23.) No such adverse inference is warranted where the material facts are largely undisputed and are established by other reliable evidence (including admissions from both parties in their respective bargaining minutes from July 8, and joint exhibits that both parties agreed to admit into evidence).

Hospital's subcontracting of work performed by its respiratory therapy technicians. (GC Exh. 1(j), par. 8.)

Under Section 7 of the Act, employees have the right to engage in concerted activities for their mutual aid or protection. Section 8(a)(1) of the Act makes it unlawful for an employer (via statements, conduct, or adverse employment action such as discipline or discharge) to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in Section 7. See *Brighton Retail, Inc.*, 354 NLRB 441, 447 (2009).

The test for evaluating whether an employer's conduct or statements violate Section 8(a)(1) of the Act is whether the statements or conduct have a reasonable tendency to interfere with, restrain or coerce union or protected activities. *KenMor Electric Co.*, 355 NLRB 1024, 1027 (2010) (noting that the employer's subjective motive for its action is irrelevant); *Yoshi's Japanese Restaurant & Jazz House*, 330 NLRB 1339, 1339 fn. 3 (2000) (same); see also *Park N' Fly, Inc.*, 349 NLRB 132, 140 (2007).

The Board has articulated the following standard that specifically applies when it is alleged that an employer's work rule violates Section 8(a)(1):

> If the rule explicitly restricts Section 7 activity, it is unlawful. If the rule does not explicitly restrict Section 7 activity, it is nonetheless unlawful if (1) employees would reasonably construe the language of the rule to prohibit Section 7 activity; (2) the rule was promulgated in response to union activity; or (3) the rule has been applied to restrict the exercise of Section 7 rights. In applying these principles, the Board refrains from reading particular phrases in isolation, and it does not presume improper interference with employee rights.

NLS Group, 352 NLRB 744, 745 (2008) (citing *Lutheran Heritage Village-Livonia*, 343 NLRB 646, 646–647 (2004)), adopted in 355 NLRB 1154 (2010), enfd. 645 F.3d 475 (1st Cir. 2011).

2. Analysis

The facts concerning the work rule at issue in this case are not in dispute. Briefly, after learning that Union representatives (and employees) Evelyn Santa and Rafael Colon were "intimidating" other hospital employees by warning that their departments could also be targeted for subcontracting, the Hospital issued a memorandum on March 31 that directed employees to "desist from making these comments immediately." (See FOF Section II(C)(3).)

The Hospital's March 31 memorandum was unlawful because employees would reasonably construe the memorandum as a work rule that prohibited Section 7 activity. Simply put, Santa and Colon were engaging in protected union activity when they spoke to coworkers about the Hospital's plan to subcontract the respiratory therapy department. The Hospital's plan directly affected employee working conditions in that department, and also raised a reasonable question about whether the Hospital might (via further subcontracting) alter the working conditions in other departments. A reasonable employee would interpret the Hospital's March 31 memorandum as prohibiting employees from discussing their concerns about those prospects.[24]

In addition, the March 31 memorandum is unlawful because the Hospital issued it in response to union activity. In her March 31 letter to the Union, Human Resources Director Rodriguez expressly stated that the Hospital would be issuing the March 31 memorandum to employees to prohibit the types of comments that Evelyn Santa and Rafael Colon were making to employees about the subcontracting dispute. Since the Hospital issued its work rule in response to (and to prohibit) protected union activity, the work rule is unlawful.

Finally, I emphasize that the work rule at issue here cannot be construed as a rule aimed solely at prohibiting misconduct that is not protected by the Act. It is well settled that the Act allows employees to engage in persistent union solicitation even when it annoys or disturbs the employees who are being solicited. *Ryder Transportation Services*, 341 NLRB 761, 761 (2004), enfd. 401 F.3d 815 (7th Cir. 2005). The Hospital's efforts to prohibit employees from "intimidating" or "affecting the emotional health of" coworkers by discussing the prospect of subcontracting run afoul of those well established principles.[25]

Because the Hospital (via its March 31 memorandum) announced an unlawful work rule that employees would reasonably construe as prohibiting Section 7 activity, and that was issued in response to union activity, I find that the Hospital violated Section 8(a)(1) of the Act.

C. Unilateral Change Allegations

1. Complaint allegations and applicable legal standards

The Acting General Counsel alleges that the Hospital violated Section 8(a)(5) and (1) in the following ways:

> (a) by, on or about March 28, 2011, unilaterally subcontracting unit work performed by respiratory therapy technicians (see GC Exh. 1(j), par. 9(a));

[24] Although not alleged in the complaint as a separate violation, I note that a reasonable employee would also interpret the Hospital's memorandum as encouraging employees to submit reports to the Hospital about the protected union activities of their coworkers. (See FOF Section II(C)(3) (memorandum asked employees to report anyone who engaged in the prohibited conduct so Rodriguez could take corrective measures); *Tawas Industries*, 336 NLRB 318, 322 (2001) (noting that an employer that combines a request for reports of harassment during union solicitation with a promise to discipline the individual accused of harassment (or otherwise take care of the problem) violates Section 8(a)(1) because the employer's statement has the potential effects of encouraging employees to identify union supporters based on the employees' subjective view of harassment, discouraging employees from engaging in protected activities, and indicating that the employer intends to take unspecified action against subjectively offensive activity without regard for whether that activity was protected by the Act).)

[25] The Board has held that *knowingly* false statements are malicious and are therefore not protected by the Act. *Central Security Services*, 315 NLRB 239, 243 (1994). The work rule at issue here, however, went well beyond targeting knowingly false statements and also targeted protected union activities such as employee discussions about the Hospital's subcontracting plans.

(b) by, on or about April 4, 2011, unilaterally changing its past practice regarding vacation policy for respiratory therapy department employees by eliminating and/or limiting employee discretion for scheduling vacation leave (see GC Exh. 1(j), par. 9(b)); and

(c) by, on or about July 9, 2011, unilaterally laying off its respiratory therapy technicians and subcontracting the work that they previously performed (see GC Exh. 1(j), par. 9(c)).

"Under the unilateral change doctrine, an employer's duty to bargain under the Act includes the obligation to refrain from changing its employees' terms and conditions of employment without first bargaining to impasse with the employees' collective-bargaining representative concerning the contemplated changes." *Lawrence Livermore National Security, LLC*, 357 NLRB 203, 205 (2011). The Act prohibits employers from taking unilateral action regarding mandatory subjects of bargaining such as rates of pay, wages, hours of employment and other conditions of employment. *Garden Grove Hospital & Medical Center*, 357 NLRB 653, 653 fn. 4, 657 (2011). Notably, an employer's regular and longstanding practices that are neither random nor intermittent become terms and conditions of employment even if those practices are not required by a collective-bargaining agreement. Id; see also *Palm Beach Metro Transportation, LLC*, 357 NLRB 108, 183–184 (2011) (noting that the party asserting the existence of a past practice bears the burden of proof on the issue, and that the evidence must show that the practice occurred with such regularity and frequency that employees could reasonably expect the practice to continue or reoccur on a regular and consistent basis).

On the issue of whether the parties bargained to an impasse, the Board defines a bargaining impasse as the point in time of negotiations when the parties are warranted in assuming that further bargaining would be futile because both parties believe they are at the end of their rope. See *Whitesell Corp.*, 357 NLRB 1119, 1182 (2011); *Daycon Products Co.*, 357 NLRB 1071, 1081 (2011). The question of whether an impasse exists is a matter of judgment based on the following factors: the bargaining history; the good faith of the parties in negotiations; the length of the negotiations; the importance of the issue or issues as to which there is disagreement; and the contemporaneous understanding of the parties as to the state of negotiations. Id. The party asserting impasse bears the burden of proof on the issue. *Daycon Products Co.*, 357 NLRB aat 1081; *Erie Brush & Mfg. Corp.*, 357 NLRB 363, 364 (2011).

2. Analysis—did the Hospital violate the Act by unilaterally subcontracting unit work performed by respiratory therapy technicians?

As noted above, the Acting General Counsel alleges that the Hospital violated Section 8(a)(5) and (1) of the Act by unilaterally subcontracting unit work performed by respiratory therapy technicians on or about March 28, 2011. (GC Exh. 1(j), par. 9(a).)

Initially, I note that the facts relating to this allegation are largely undisputed. The record establishes that on March 15, the Hospital notified the Union that it planned to subcontract the respiratory therapy department. After one bargaining session (on March 24) that was limited to discussing the impact of the Hospital's decision and the Union's request for information about the Hospital's plans, the Hospital unilaterally subcontracted work performed by respiratory therapy technicians by subcontracting with RTM to provide per diem employees to work in the respiratory therapy department. (FOF Section II(C)(1–2).)

The law is clear that subcontracting is a mandatory subject of bargaining if it involves nothing more than the substitution of one group of workers for another to perform the same work and does not constitute a change in the scope, nature, and direction of the enterprise.[26] *Daycon Products Co.*, 357 NLRB at 1081. The Hospital was in precisely that situation when it subcontracted with RTM to provide per diem respiratory therapy technicians to work in the respiratory therapy department.

As its defense, the Respondent asserts that it had a past practice of using temporary workers to cover employee absences. (See R. Posttrial Brief at 4) That argument fails. While it is true that the collective-bargaining agreement permits the Hospital to hire temporary employees if certain criteria are met, the Hospital admitted (through Rodriguez) that the per diem employees that RTM provided were *not* hired temporary employees covered by the collective-bargaining agreement. (FOF, Section II(C)(2) (also indicating that the Hospital has not used a temporary employee under the collective-bargaining agreement since August 2010).) Since there was no preexisting procedure or practice for hiring the per diem employees that RTM provided (under the collective-bargaining agreement or otherwise), the Hospital's decision to subcontract with RTM was a new development (borne out of the Hospital's January 2011 plan to subcontract the entire respiratory therapy department), rather than the product of a past practice.[27] (FOF, Section II(B); see also *Sociedad Espanola de Auxilio Mutuo y Beneficiencia de*

[26] A union's interest in subcontracting decisions is not limited to circumstances where unit employees are laid off or replaced because of subcontracting. See *Acme Die Casting*, 315 NLRB 202, 202 fn. 2 (1994). Instead, in addition to the prospect of layoffs, union members have an interest in subcontracting decisions because work identified for subcontracting provides bargaining unit members with the opportunity to obtain extra shifts (possibly at higher wage rates than the employer might pay for overtime or for working undesirable hours), or expand or maintain the size of the bargaining unit with newly hired employees. See *Sociedad Espanola de Auxilio Mutuo y Beneficiencia de Puerto Rico v. NLRB*, 414 F.3d 158, 167 (1st Cir. 2005).

[27] The principal case that the Hospital cited in support of its defense is readily distinguishable. In *Westinghouse Electric Corp.*, 150 NLRB 1574 (1964), the Board found that the respondent did not violate Section 8(a)(5) and (1) when it unilaterally subcontracted some bargaining unit work. As the Board explained, however, the respondent demonstrated that subcontracting was an established practice that the respondent had relied on for over 20 years in conducting its manufacturing operations. Id. at 1574, 1576. Since the respondent made the disputed subcontracting decisions in a manner consistent with its past practices, the Board found that the respondent did not violate Section 8(a)(5) or (1) of the Act. Id. at 1577.

Here, the Hospital did not present any credible evidence that its decision to subcontract with RTM to provide per diem employees was supported by an established past practice. The decision in *Westinghouse* is therefore inapposite.

Puerto Rico, 342 NLRB 458, 458, 468–469 (2004), enfd. 414 F.3d 158, 167 (1st Cir. 2005) (finding that the respondent violated Section 8(a)(5) and (1) by unilaterally subcontracting out the work of X-ray technicians and respiratory therapists where the evidentiary record did not demonstrate a past practice of subcontracting or a compelling economic reason for the respondent's unilateral decision).)

Based on the foregoing analysis, I find that the Hospital ran afoul of Section 8(a)(5) and (1) when it unilaterally decided to subcontract with RTM on March 25 to provide respiratory therapy technicians to the Hospital on a per diem basis. The Hospital's past practice defense falls well short for the reasons stated above, and it is undisputed that the parties did not bargain to impasse (to the extent that any bargaining occurred at all) before the Hospital made its decision.

3. Analysis—did the Hospital violate the Act by unilaterally changing its past practice regarding vacation policy?

Next, the Acting General Counsel contends that the Hospital unilaterally changed its past practice regarding vacation policy for respiratory therapy department employees by eliminating and/or limiting employee discretion for scheduling vacation leave. (GC Exh. 1(j), par. 9(b).) The Acting General Counsel's theory is based on Rafael Colon's testimony that on April 4, respiratory therapy department Supervisor Carlos Diaz informed him that he would need to take vacation leave for a month, starting on April 11. (FOF sec. II,(C),(4); see also *Rosdev Hospitality, Secaucus, LP*, 349 NLRB 202, 203 (2007) (finding that an employer's unilateral change to established past practices for leave accrual violated Section 8(a)(5) and (1) of the Act).)

The Acting General Counsel did not meet its burden of proof with this allegation because it did not show that the Hospital (through Diaz) departed from its past practices for vacation leave. At most, Colon's testimony established that in his experience, when scheduling conflicts arose for vacation leave, Diaz would meet with him and attempt to work out an agreed alternative vacation plan. It does not follow from that past history, however, that the Hospital had a past practice of giving employees discretion in scheduling vacation leave regardless of the circumstances. To the contrary, as Diaz explained (without rebuttal), employees have always been limited in their selection of vacation leave by factors such as the collective-bargaining agreement's 16-month time limit for accruing vacation leave, and the vacation schedules of other employees. Both of those factors were in play when Colon and Diaz met on April 4, because Colon was running out of time to use his accrued vacation leave (due to the 16-month limitation, which would cause Colon to forfeit leave if not used before June 14), and because two other employees were already scheduled to be on vacation from May 9 to June 8. (FOF Section II(C)(4)) Given those circumstances, both Colon's and Diaz' hands were tied, as the only window of opportunity for Colon to use his vacation leave before the 16-month deadline was the April 11 to May 10 timeframe that Diaz offered.

In short, Diaz followed the Hospital's practice of meeting with employees to reschedule vacation time when conflicts arise with vacation leave requests. To the extent that Diaz presented Colon with only one timeframe (April to May 2011) for using his vacation leave, he did so based on factors that the Hospital always considers when scheduling vacation leave for employees. Accordingly, I recommend that the allegation in paragraph 9(b) of the complaint be dismissed because the Acting General Counsel did not meet its burden of proof.

4. Analysis—did the Hospital violate the Act by unilaterally laying off its respiratory therapy technicians and subcontracting their work?

Last, the Acting General Counsel alleges that the Hospital violated Section 8(a)(5) and (1) when it unilaterally laid off its respiratory therapy technicians and subcontracted the work that they previously performed. (GC Exh. 1(j), par. 9(c).) In response, the Hospital maintains that it was lawful to take unilateral action because the parties bargained to impasse about the subcontracting issue.

As outlined in the findings of fact, the Hospital first notified the Union on March 15 of its plan to subcontract the respiratory therapy department. After giving that initial notice, the Union and the Hospital participated in 10 bargaining sessions between March 24 and July 8. July 8, however, is the pivotal day in the analysis, because July 8 was the day that the parties finally began discussing formal offers aimed at addressing the Hospital's efforts to reduce its operating costs, and July 8 was also the day that the Hospital decided to discharge the regular (Union) employees in the respiratory therapy department. (See FOF, secs. II,(C) (1–2, 5–10).)

Viewing the record as a whole, I find that the parties were not at impasse when the Hospital unilaterally discharged its respiratory therapy technicians. In the morning on July 8, the Union offered to agree to reduce the monthly meal stipend from $55 per employee to $30, if the Hospital agreed to drop its subcontracting plan and comply with some conditions regarding future hiring in the department, shift assignments for two employees, and future review of the monthly meal stipend amount. After taking a break from negotiations to consider the Union's offer, the Hospital rejected the Union's offer in the afternoon on July 8, and then proceeded to discharge the eight respiratory therapy technicians that it still employed. (See FOF, Sections II(C) (7–9).)

The problem with the Hospital's unilateral decision to discharge its respiratory therapy technicians at that point (in the afternoon on July 8) was that the parties were not yet at impasse. Indeed, when the parties agreed to return to the bargaining table in the evening on July 8 (after the discharges had been completed), both the Hospital and the Union offered additional proposals and concessions in an effort to make the monthly meal stipend reduction more attractive as an alternative to subcontracting. The Union, for example, offered to decrease the monthly meal stipend to $27.50 per employee, which would have produced a higher savings to the Hospital than the subcontracting alternative. The Union also offered to drop its condition that the parties meet every trimester to review the savings that the reduced stipend was producing for the Hospital. Meanwhile, the Hospital indicated that it would be willing to accept the Union's proposed hiring restrictions for the respiratory therapy department, and also offered to only assign the

regular employees to the morning or afternoon shifts (with only per diem employees handling the graveyard shift) if the Union agreed to reduce the monthly meal stipend to $25 per employee. Meaningful negotiations did not end that evening until the Hospital rejected the Union's offer to agree to reduce the monthly meal stipend to $25 per employee if the Hospital accepted its condition that two employees (Colon and Leon) be assigned to permanent shifts. (See FOF Section II(C)(10)) Since neither party was at the end of its negotiating rope when the parties began the evening negotiations on July 8 (as shown by the multiple offers and counteroffers that the parties made during the evening session), it follows that the parties were not at impasse when the Hospital discharged its respiratory therapy technicians in the afternoon on July 8.[28]

With that background, I turn to the Hospital's final argument—that although it informed employees of their discharges on July 8, the discharges did not take effect until July 13, and thus after negotiations fell apart in the evening on July 8. I do not find the Hospital's argument to be persuasive. The evidentiary record shows that the Hospital went through great lengths to discharge its employees on July 8, including meeting with all eight respiratory technicians (including technicians who were not on duty and had to be called in), collecting their keys and identification badges, and using RTM employees to cover all work shifts from the afternoon of July 8 onward. The Hospital also gave each of the respiratory therapy technicians a discharge letter stating that it had made a "final decision" to subcontract the respiratory therapy department. To the extent that the Hospital paid employees through July 13, I find that the Hospital did so merely to comply with the notice requirements of the collective-bargaining agreement—the Hospital made it imminently clear that apart from receiving their final paychecks, the respiratory therapy technicians were finished as Hospital employees as of the afternoon of July 8.

Since the parties were not at impasse when the Hospital unilaterally discharged its respiratory therapy technicians in the afternoon on July 8, I find that the Hospital violated Section 8(a)(5) and (1) as alleged in the complaint.

CONCLUSIONS OF LAW

1. By issuing and distributing a memorandum on March 31, 2011, that prohibited discussions among employees related to the Respondent's subcontracting of work performed by its respiratory therapy technicians, the Respondent violated Section 8(a)(1) of the Act.

2. By, on or about March 25, 2011, unilaterally subcontracting bargaining unit work performed by respiratory therapy technicians without first giving notice to and bargaining with the Union, the Respondent violated Section 8(a)(5) and (1) of the Act.

3. By unilaterally discharging eight respiratory therapy technicians (Rafael Colon, Mirna Leon, Jose Cruz, Nancy Gonzalez, Norma Rivera, Felicita Leon, Catherine Colon and Enid Ortiz) on July 8, 2011, and subcontracting the work that they previously performed without first bargaining with the Union to impasse, the Respondent violated Section 8(a)(5) and (1) of the Act.

4. By committing the unfair labor practices stated in Conclusions of Law 1–3 above, the Hospital has engaged in unfair labor practices affecting commerce within the meaning of Section 8(a)(5) and (1) and Section 2(6) and (7) of the Act.

5. I recommend dismissing the allegation in paragraph 9(b) of the complaint.

REMEDY

Having found that the Respondent has engaged in certain unfair labor practices, I shall order it to cease and desist therefrom and to take certain affirmative action designed to effectuate the policies of the Act.

The Respondent, having unlawfully subcontracted unit work on or about March 25, 2011, must make the following employees whole for any loss of earnings and other benefits that resulted from that subcontracting decision: Rafael Colon, Mirna Leon, Jose Cruz, Nancy Gonzalez, Norma Rivera, Felicita Leon, Catherine Colon, Enid Ortiz, Ivette Borrero and German Mercado. Backpay for this violation shall be computed in accordance with *Ogle Protection Service*, 183 NLRB 682 (1970), enfd. 444 F.2d 502 (6th Cir. 1971), with interest at the rate prescribed in *New Horizons*, 283 NLRB 1173 (1987), compounded daily as prescribed in *Kentucky River Medical Center*,

[28] In its answer to the complaint, the Respondent suggested that its decision to subcontract the respiratory therapy department was justified because economic exigency. (GC Exh. 1(l) at p. 3.) It appears that the Respondent abandoned that theory, however, because it did not raise the economic exigency exception in its posttrial brief.

In any event, the record does not show that the Respondent's unilateral decision to discharge its respiratory therapy technicians and subcontract with RTM was justified due to economic exigency. The Board has explained that when a union and an employer are engaged in negotiations for a collective-bargaining agreement, unilateral changes are generally prohibited unless an impasse develops on bargaining for the agreement as a whole. *RBE Electronics of S.D.*, 320 NLRB 80, 81 (1995). There are, however, two limited exceptions to that general rule: when a union engages in tactics designed to delay bargaining, and when economic exigencies compel prompt action. Id. (noting that the economic exigency exception requires a heavy burden of proof). The Board recognized that bargaining can be excused altogether if there are extraordinary events which are an unforeseen occurrence and have a major economic effect that requires the company to take immediate action. Id. In addition, however, the Board recognized that other economic exigencies that are not sufficiently compelling to justify excusing bargaining altogether may warrant unilateral action if the employer first provides adequate notice to the union and an opportunity to bargain, and the subsequent bargaining reaches impasse regarding the matter proposed for change. Id. at 81–82 (noting that employer may also take unilateral action if the union waives its right to bargain).

In this case, the Hospital cannot meet either version of the economic exigency exception. There is no evidence that the Hospital faced an extraordinary and unforeseen occurrence that required immediate action. Indeed, the Hospital began its efforts to cut costs in 2009, and thus the ongoing need for cutting costs was foreseeable by the time the Hospital began considering subcontracting the respiratory therapy department in January 2011. Because the Hospital did not face economic exigencies that would warrant excusing all bargaining, the Hospital was required to bargain with the Union to impasse before taking unilateral action regarding subcontracting. As discussed above, the Hospital failed to fulfill that requirement when it unilaterally discharged its respiratory therapy technicians in the afternoon on July 8 despite the fact that the parties were not at impasse.

356 NLRB 6 (2010), enf. denied on other grounds sub nom. *Jackson Hospital Corp. v. NLRB*, 647 F.3d 1137 (D.C. Cir. 2011).

In addition, the Respondent, having unlawfully discharged Rafael Colon, Mirna Leon, Jose Cruz, Nancy Gonzalez, Norma Rivera, Felicita Leon, Catherine Colon and Enid Ortiz,[29] must offer them reinstatement and make them whole for any loss of earnings and other benefits. Backpay shall be computed in accordance with *F. W. Woolworth Co*., 90 NLRB 289 (1950), with interest at the rate prescribed in *New Horizons for the Retarded*, supra, compounded daily as prescribed in *Kentucky River Medical Center*, supra.

The Acting General Counsel has requested that I issue a broad remedial order in this case because the Respondent "is a recidivist [that] has previously committed unlawful unilateral changes." (GC Exh. 1(j) at p. 6.) The Board has stated that "a broad cease-and-desist order enjoining a respondent from violating the Section 7 rights of employees 'in any other manner,' is warranted 'when a respondent is shown to have a proclivity to violate the Act or has engaged in such egregious or widespread misconduct as to demonstrate a general disregard for the employees' fundamental statutory rights.'" *Five Star Mfg.*, 348 NLRB 1301, 1302 (2007) (citing *Hickmott Foods*, 242 NLRB 1357, 1357 (1979)), enfd. 278 Fed. Appx. 697 (8th Cir. 2008). In either situation, the Board reviews the totality of circumstances to ascertain whether the respondent's specific unlawful conduct manifests an attitude of opposition to the purposes of the Act to protect the rights of employees generally, which would provide an objective basis for enjoining a reasonably anticipated future threat to any of those Section 7 rights. Id.

I find that the Acting General Counsel's request for a broad remedial order has merit because the Respondent has indeed shown a proclivity to violate the Act. Briefly, the Respondent has been found to have committed the following violations of Section 8(a)(5) and (1) of the Act since November 2009:

(1) November 2009—unilaterally ending its past practice of paying holiday pay to employees whose day off occurred on a holiday;

(2) January 7, 2010—unilaterally eliminating its past practice of allowing employees to use sick leave while receiving workers compensation;

(3) March 1, 2010—unilaterally ending its practice of paying nursing employees incentives and differentials above their base salaries;

(4) May 24, 2010—unilaterally ending all permanent shifts in the Respiratory therapy department; and

(5) May 27, 2010—unilaterally changing and reducing the number of employee holidays.

See *Hospital San Cristobal*, 356 NLRB 699 (2011) (Case 24–CA–011438, finding violations 1–2 and 4–5 above); *Quality Health Services*, Case 24–CA–011630 (2011) (finding violation 3, above). Notably, the Board issued its ruling in Case 24–CA–11438 on February 17, 2011, only a few months before the Respondent took the unlawful unilateral actions that I have addressed in this case. Given this background and the fact that the Respondent's attorney advised the Respondent that it should bargain with the Union about its contemplated decision to subcontract the respiratory therapy department and the effects of such a decision (see FOF Section II(C)(5)), the Respondent should have been well aware of the requirements of the Act regarding making unilateral changes to the terms and conditions of employment of its employees.

In light of the Respondent's repeated failure to correct its pattern of making unlawful unilateral changes to working conditions, I find that the Respondent has a proclivity for violating the Act (see, e.g., *Hospital San Cristobal*, 356 NLRB 699 (Case 24–CA–011438); *Quality Health Services*, Case 24–CA–011630 (2011)), and because of the serious nature of the violations, I find it necessary to issue a broad Order requiring the Respondent to cease and desist from infringing in any other manner on rights guaranteed employees by Section 7 of the Act. *Hickmott Foods*, supra.

[Recommended Order omitted from publication.]

[29] Ivette Borrero and German Mercado resigned in April 2011, and thus were not affected by the subsequent discharges that occurred on July 8. (Jt. Exh. A, pars. 5–6.)